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Liability and Bodily Injury Claims: Expanding Boundaries - Posttraumatic Stress Disorder and Other Contentious Diseases

Ina Ebert

Contentious diseases/PTSD



- „Contentious diseases“: diseases that are hard to objectify, where it is difficult or impossible to be certain whether a patient/claimant suffers from it.
Important Examples for liability insurance: Whiplash, Posttraumatic Stress Disorder (PTSD)
- PTSD: Psychological consequences following exposure to a terrifying, highly traumatic event or ordeal a person has experienced, witnessed or learned about. Accepted as psychiatric diagnosis since 1980 (DSM-III), before e.g. „Shell shock“, „battle fatigue“, „Soldiers´ heart“.
 - Cause: intense fear, helplessness or horror, often in combination with actual or threatened danger of death/serious injury to victim/other person (e.g. war, natural catastrophe, act of terrorism, crime, severe accident/illness, medical malpractice)
 - estimate: 8-15 % of all adults in the US/Europe will develop PTSD during lifetime (women twice as likely as men)
 - likelihood of PTSD 8 % after serious accident, over 50 % after rape

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Assessing and treating PTSD



- Symptoms:
 - re-experiencing of the traumatic event,
 - emotional detachment, numbing of feelings or hypervigilance,
 - avoidance of reminders, extreme distress when reminded,
 - depression, anxiety, chronic pain without medical basis
- Assessment of PTSD: Interviews based on checklists that consider
 - intensity/duration of traumatic experience
 - frequency/intensity of symptoms
 - impact of symptoms on social/occupational functioning
- Requirements:
 - Symptoms lasting for more than a month
 - chronic PTSD: more than 3 months
 - delayed onset PTSD: occurs months/years after traumatic event
- Treatment: Psychotherapy or medication (not always successful)

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Compensation for PTSD



- state compensation schemes/funds (e.g. war veterans)
- all branches of the insurance industry dealing with personal injury:
 - health
 - disability
 - Workers Comp (e.g. bank clerk suffers PTSD after robbery)
 - all varieties of liability insurance from auto (serious traffic accident) to EPLI (harassment at the workplace)
- Amount of damages awarded: can be very high (Roman Catholic church in the US spent \$ 460m in 2005 for settlements in sexual abuse cases)

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PTSD litigation: Legal issues

- Long gap in time (often years) between traumatic event and claim leads to difficulties related to:
 - proving traumatic event
 - proving causation
 - statute of limitations (therefore lately often special provisions, e.g. for abused children)
- Deciding whether tortfeasor should be held liable for reaction of victim (e.g. lifelong consequences after minor accident, prior neurosis of victim)
- Distinguishing symptoms from normal, temporary fluctuations in health or behaviour
- Scope of eligible persons: Necessity of direct exposure to traumatic event, US: „zone of danger“ (rescue workers/firefighters?)

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Example # 1: Sexual abuse of children by priests

- Thousands of claims, especially since 2002
- Mainly USA, but also Commonwealth and other countries
- Claims against Catholic church based on:
 - Mistakes when choosing priests
 - wrong reactions after abuse claims
 - attempts to cover-up by bribing or threatening witnesses, withholding evidence
 - lack of victim-protection after knowledge of abuse
- Legal issues:
 - Proof of abuse (lack of witnesses/other evidence)
 - Proof of Causation
 - statute of limitation
 - Who should be held liable with what assets?

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Example # 2: Harassment at the workplace

- moral/sexual harassment at the workplace leads to liability/compensation even without damage to health, but awards higher if health damage (often PTSD) involved
- Legal issues:
 - shifts in burden of proof due to EU-regulation if harassment is based on illegal discrimination (gender, age, religion, ethnic background etc.)
 - causation harassment/PTSD
 - unclear trigger (ongoing process instead of one serious occurrence)
 - proof high number of minor offences after long time

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Example # 3: Ramstein air-show accident 1988

- 70 spectators killed, hundreds injured when jet fighters of Italian display team collide
- Legal issues:
 - scope of eligible claimants (only visitors present when accident happened, rescue persons, relatives of people killed/injured?)
 - statute of limitation (because PTSD was not yet very well known to the public when accident happened, leading to long delays in bringing claims to court): Court decided that period of limitation starts when accident-related long-term consequences could have been foreseen by experts (i.e. three years after the accident)

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Example # 4: PTSD as a substitute for pain-and-suffering awards for relatives



- a few states (Germany, Netherlands) still lack any compensation for pain and suffering by relatives after a case of wrongful death, even so acceptance of this among public is dwindling
- result: courts sometimes resort to PTSD to be able to award damages for pain and suffering to relatives, e.g. to
 - man who felt remorse because he ignored pleas for help of his old father, who later died due to medical malpractice („only moderate requirements“ for evidence of psychological damage suffered by relative after medical malpractice related death)
 - parents and brothers of child who drowned in a swimming pool because his arm was drawn into unprotected suction fitting near water slide (even though unclear why parents/brothers' reactions went beyond reactions normal under such circumstances – up to then a requirement for awarding damages)

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Conclusions



- Grown significance of PTSD for liability insurance because:
 - widespread, difficult to assess symptoms make it a very „useful“ disease both for claimants and courts who want to award damages for non-pecuniary loss that could otherwise not be justified
 - increased awareness of public/media due to frequent reports about war veterans, victims of acts of terrorism (9/11, Madrid) and natural catastrophes
 - better protection of civil rights leads to increase in claims for PTSD against state
 - new, more victim-friendly provisions concerning statute of limitations (e.g. abuse of children) or burden of proof (harassment)
 - loss of authority of churches and public entities leads to claims based on crimes that happened decades ago

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Liability and Bodily Injury Claims: Expanding Boundaries - Posttraumatic Stress Disorder and Other Contentious Diseases *Questionnaire*

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1. Do you think changes in the legislation concerning the statute of limitation in cases of sexual abuse of children have













